

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-131

In the Matter of

Amendment of Part 95 of the
Commission's Rules to Modify
Construction Requirements for
Interactive Video and Data
Service (IVDS) Licenses

NOTICE OF PROPOSED RULE MAKING

Adopted: July 31, 1995;

Released: August 14, 1995

Comment Date: October 5, 1995

Reply Comment Date: October 20, 1995

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rulemaking (Notice)* proposes to amend Section 95.833(a) of the Commission's Rules¹ to eliminate the one-year construction "build-out" requirement for Interactive Video and Data Service (IVDS).² licensees. No change is proposed concerning the three-year and five-year construction benchmarks. We initiate this proceeding on our own motion in response to requests by several IVDS licensees that were awarded their licenses as a result of the initial IVDS auction held July 28-29, 1994.³

¹ 47 C.F.R. § 95.833(a).

² IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service in which licensees may provide information, products, or services to individual subscribers at fixed locations within a service area, and subscribers may provide responses.

³ These licenses were issued on January 18 or February 28, 1995.

⁴ The eighteen IVDS licensees that received their licenses as a result of a lottery held September 15, 1993, have already passed their one year build-out deadline. We waived the one year deadline for 17 of the 18 licenses. These 17 licensees were required to meet the three year-30 percent construction deadline in March, 1997.

⁵ Intrinzix Technologies, Inc. (Intrinzix), Letter from James E. Meyers, Esq., to Robert H. McNamara, Acting Chief, Private Radio Division, Wireless Telecommunications Bureau (Jan.24, 1995); Knightsbridge Business Network, Letter from Genilde Guerra, President, to Office of Managing Director (Jan.19, 1995); Women's Collateral Access Fund, Inc., Letter from Nina Brown, Vice President, to Donna Kanin, Private Radio Division, Wireless Telecommunications Bureau (May 22, 1995); Loli, Inc., "Request for Waiver or Request for Rulemaking," filed June 22, 1995; MKS Interactive, Inc., "Petition for Special and Extraordinary Relief," filed October 31, 1994, at 11-12; Self Commu-

II. DISCUSSION

2. Section 95.833(a) specifies that each IVDS licensee must make service available to at least 10 percent of the population or geographic area within the license service area within one year of the grant of the license, 30 percent within three years, and 50 percent within five years. As noted, certain auction winners⁴ request the elimination of the one-year construction benchmark.⁵ They argue that the IVDS equipment market is in early development, and does not yet provide sufficient quantities of suitable, competitively priced equipment. They further argue that technological development will be unnecessarily curtailed if the industry is consigned to the limited scope and application of the current equipment options.⁶

3. Section 95.833(a) was crafted in 1992 in the context of awarding licenses by lottery, and was intended "to reduce the filing of speculative applications by entities that have no real intention of implementing [IVDS] systems and to avoid the potential for warehousing of IVDS spectrum."⁷ The present proposal is premised on the assumption that the basis for the one-year construction benchmark is no longer necessary when licenses are awarded by auction. The use of auctions to award licenses, we believe, reduces the incentives for speculation. Thus, we tentatively conclude that the one-year benchmark is unnecessary. We believe that where licenses are awarded to those who value them most highly, licensees will have sufficient economic incentives to provide service as quickly as possible and to compete effectively against the other licensee in their service area. We believe, in addition, that it is in the public interest to provide licensees with greater flexibility in making decisions concerning financing, equipment selection, and other considerations related to construction.⁸ In addition, because our proposed action would not alter the three- and five-year benchmarks, licensees would still be required to act responsibly in delivering service to the public in a timely fashion, as contemplated by the general rule. Finally, section 309(j)(4)(B)⁹ requires that we have performance requirements in auctionable services, and our

nications, Inc., "Petition for IVDS System Frequency Change and Request to Hold Construction Requirements in Abeyance," filed January 24, 1995, at 3-4; and joint petitioners AG Partners, Friends of IVDS, IVDCO LLC, IVDS/RLV Partnership, Infopower International, Nanowave Technologies, New England Mobile Communication, Tele-Link Communications, WCTV Partners, Washington Communications, Wayne Partners, and Zarg Corporation, "Petition for Extraordinary Relief," filed August 26, 1994, at 5. In addition, certain of these petitioners have requested that the Commission suspend its processing of IVDS licenses and thereby suspend the commencement of the build-out periods. These requests are moot, given that we have completed the process of granting those licenses to be awarded as a result of the initial, July 28-29, 1994, IVDS auction.

⁶ See, e.g., Intrinzix filing, *supra*. The IVDS is, by design, a very flexible radio service, with technical service rules that permit licensees considerable flexibility in choosing equipment specifications/capabilities. See *Report and Order* in GEN Docket No. 91-2, 7 FCC Rcd 1630, 1633 ¶ 21-23, 1637 ¶ 54 (1992).

Report and Order, supra, at 1640 ¶ 73; see also *Memorandum Opinion and Order* in GEN Docket No. 91-2, 7 FCC Rcd 4923, 4925 ¶ 13 (1992).

⁸ See *Notice of Proposed Rule Making* in WT Docket No. 95-47, FCC 95-158.

⁹ 47 U.S.C. § 309(j)(4)(B).

proposed three- and five-year benchmarks are consistent with that statutory requirement. We invite comment on the proposed rule change.

III. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

4. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

5. An initial Regulatory Flexibility Analysis is contained in Appendix A to this Notice.

6. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Analysis in Appendix A, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

Comment Dates

7. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **October 5, 1995** and reply comments on or before **October 20, 1995**. To file formally in this proceeding, you must file an original and five copies of all comments and reply comments. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number is specified in the heading. If you want each Commissioner to receive a personal copy of your comments, you should file an original and nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.


Authority

8. Authority for issuance of this Notice is contained in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

Further Information

9. For further information, contact Donna L. Kanin, Federal Communications Commission, Wireless Telecommunications Bureau, Private Wireless Division, 2025 M Street, N.W., Room 8010, Mail Stop 2000-F, Washington, D.C. 20554; (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal contained in this Notice. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 11, *supra*.

Reason for Action

The Commission proposes to amend Part 95 of its rules to eliminate the first-year, 10 percent construction requirement in the Interactive Video and Data Service (IVDS). With competitive bidding, the rationale for the first-year requirement, *i.e.* speculation and spectrum warehousing, no longer exist. This change will provide IVDS licensees more time and greater opportunity for business viability, while the timetable for service to the public remains constant.

Objectives

The proposed rule change will provide additional flexibility in satisfying our construction benchmarks, while encouraging greater economic viability of IVDS licensees and timely telecommunications offerings for consumers and producers.

Legal Basis

The proposed action is authorized under Sections 4(i), 303(r) and 309(j) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

Report, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict with These Rules:

None.

Description, Potential Impact, and Small Entities Involved

The proposed rule change would benefit IVDS licensees by allowing them greater flexibility in satisfying the construction benchmarks, and thus, greater opportunity for economic viability, without sacrificing service to the public. Most IVDS licensees are expected to be small entities.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

APPENDIX B

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 95-Personal Radio Services

1. The authority citation for Part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Section 95.831 is revised to read as follows:

§ 95.831 Service requirements.

Subject to the initial construction requirements of Section 95.833, each IVDS system licensee must make the service available to at least 50 percent of the population or land area located within the service area.

2. Section 95.833 is revised to read as follows:

§ 95.833 Construction requirements.

(a) Each IVDS system licensee must make the service available to at least 30 percent of the population or land area within the service area within three years of grant of the IVDS system, and 50 percent of the population or land area within five years of grant of the IVDS system license. Failure to do so will cancel the IVDS system license automatically. For the purposes of this section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

(b) Each IVDS system licensee must file a progress report at the conclusion of each of the two benchmark periods to inform the Commission of the construction status of the system. The report must be addressed to: Federal Communications Commission, Wireless Telecommunications Bureau, Special Services Branch, 1270 Fairfield Road, Gettysburg, PA 17325-7245. The report must include:

- (1) A showing of how the system meets the benchmark; and
- (2) A list, including addresses, of all component CTSs constructed.